RECORD AND BRIEFS

No. 15-1439

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CYAN, INC. ET AL.,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.,

Respondents

On Petition for a Writ of Certiorari
To The Court of Appeal of The State Of California,
First Appellate District

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are prominent law professors whose scholarship and teaching focuses on the federal securities laws. This brief reflects the consensus of *amici* that this Court should grant Cyan, Inc.'s Petition for Writ of Certiorari to resolve whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") grants federal courts exclusive jurisdiction over covered class actions that allege only claims under the Securities Act of 1933 ("33 Act").

This question has split federal district courts, which have addressed the question on motions to remand in cases that had been removed to federal court. Because remand orders are not appealable, federal circuit courts have not had, and will not have, the opportunity to address the issue. The result is that covered class actions alleging only 33 Act claims are brought exclusively in federal court in some jurisdictions, and primarily in state court in other jurisdictions. *Amici* believe that this could not have been the result Congress intended when

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici curiae* submit this brief in support of the petition for writ of certiorari. As required by Rule 37.2(a), amici provided 10 days' notice to all parties of their intent to file a brief as *amici curiae*. All parties have consented to the filing. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than *amici curiae*, its members, or its counsel have made such a monetary contribution.

passing SLUSA. Each individual *amicus*, however, may not endorse every argument made in this brief.

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SUMMARY OF ARGUMENT

Dozens of district courts across the country have issued conflicting decisions on whether state courts have jurisdiction to hear class actions asserting claims solely under the 33 Act in light of the jurisdictional amendments adopted in SLUSA. District courts in five circuits have held that SLUSA divested state courts of jurisdiction over such cases, while the district courts of four other circuits have held the opposite. Because these decisions have issued as remand orders, they are not appealable. Thus, despite more than 50 district court rulings, there are *no* decisions on this issue from the federal circuit courts of appeals, and there likely never will be. This case presents the rare situation where a split among the district courts justifies this Court's review.

The inconsistent lower court rulings have had a profound effect on the litigation of class actions alleging 33 Act violations. Most notably, filing of these cases in California state courts has rapidly increased. State courts do not apply the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The result—as shown in Appendices A and B—is that state and federal courts have markedly different dismissal rates. Between 2011 and 2015, federal courts dismissed 29% of cases filed with only 33 Act claims, whereas state courts in California, for example, dismissed only two of 25 such cases without leave to amend. This Court has long recognized the *in terrorem* effect of class actions brought on behalf of investors under the federal

securities laws.[2] Congress passed the PSLRA and SLUSA to dampen this effect. Yet the inconsistent application of SLUSA's jurisdictional provisions promotes rather than deters *in terrorem* settlements. This Court should grant review to give guidance to district courts consistent with the purposes of SLUSA and the PSLRA.

ARGUMENT

I. THIS CASE PRESENTS AN EXTRAORDINARY CIRCUMSTANCE IN WHICH A SPLIT AMONG FEDERAL DISTRICT COURTS IS SUFFICIENT TO WARRANT A GRANT OF CERTIORARI BECAUSE A CIRCUIT SPLIT IS DE FACTO IMPOSSIBLE.

A split among the United States courts of appeal has long been a factor this Court has considered in deciding whether to grant review. SUP. CT. R. 10(a). While there is no such split here, dozens of federal district judges are divided on the question presented, and this case presents the rare situation in which differing decisions by the district courts justify this Court's review.

There is a dramatic split among the district courts regarding state jurisdiction of 33 Act class actions after SLUSA. The majority of district courts

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[2] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740, 741 (1975); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

in the Second,[3] Third,[4] Fourth,[5] Fifth,[6] and Tenth[7] circuits have held that SLUSA grants federal courts exclusive jurisdiction over 33 Act cases and have denied remand when defendants have removed the cases to federal court. However, the majority of district courts in the First[8], Seventh,[9] Ninth,[10] and

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[3] *Rubin v. Pixelplus Co., Ltd.*, No. 06-CV-2964 (ERK), 2007 WL 778485 (E.D.N.Y. Mar. 13, 2007) (denying remand); *In re Fannie Mae 2008 Sec. Litig.*, Nos. 08 Civ. 7831(PAC), 09 Civ. 1352(PAC), 2009 WL 4067266 (S.D.N.Y. Nov. 24, 2009) (same); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009) (same); *Hung v. Idreamsky Technology Limited*, 15-cv-03794 (S.D.N.Y. 2016) (same); *but see Bernd Bildstein IRRA v. Lazard Ltd.*, No. 05 CV 3388(RJD)(RML), 2006 WL 2375472 (E.D.N.Y. Aug. 14, 2006) (granting remand).

[4] *Pinto v. Vonage Holdings Corp.*, No. 07-0062(FLW), 2007 WL 1381746 (D.N.J. May 7, 2007) (denying remand); *Rovner v. Vonage Holdings Corp.*, No. 07-178(FLW), 2007 WL 446658 (D.N.J. Feb. 7, 2007) (same).

[5] *Wunsch v. Am. Realty Capital Properties*, No. JFM-14-4007, 2015 WL 2183035 (D. Md. Apr. 14, 2015) (denying remand); *Lowinger v. Johnston*, No. 3:05CV316-H, 2005 WL 2592229 (W.D.N.C. Oct. 13, 2005) (same); *but see Niitsoo v. Alpha Nat. Res., Inc.*, 902 F. Supp. 2d 797 (S.D. W. Va. 2012) (granting remand).

[6] *Alkow v. TXU Corp.*, Nos. 3:02-CV-2738-K, 3:02-CV-2739-K, 2003 WL 21056750 (N.D. Tex. May 8, 2003) (denying remand); *Brady v. Kosmos Energy Ltd.*, Nos. 3:12-CV-0373-B, 3:12-CV-0781-B, 2012 WL 6204247 (N.D. Tex. July 10, 2012) (same); *but see In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590 (S.D. Tex. 2002) (granting remand).

[7] *Northumberland Cty. Ret. Sys. v. GMX Res., Inc.*, 810 F. Supp. 2d 1282 (W.D. Okla. 2011) (denying remand).

[8] *Fortunato v. Akebia Therapeutics, Inc.*, 15-13501-PBS, 2016 WL 1734073 (D. Mass. Apr. 29, 2016) (granting remand); *In re Tyco Int'l Ltd.*, 322 F. Supp. 2d 116 (D.N.H. 2004) (same).

[9] *Nauheim v. Interpublic Grp. of Companies, Inc.*, No. 02-C-9211, 2003 WL 1888843 (N.D. Ill. Apr. 16, 2003) (granting remand); *Higginbotham v. Baxter Int'l, Inc.*, No. 04 C 4909, 04 C 7096, 2005 WL 1272271 (N.D. Ill. May 25, 2005) (same).

[10] *Pipefitters Local 522 and 633 Pension Tr. Fund v. Salem Commc'ns Corp.*, No. CV 05-2730-RGK (MCx), 2005 WL 6963459 (C.D. Cal June 28, 2005) (granting remand); *Layne v. Countrywide Fin. Corp.*, No. CV 08-3262 MRP (MANx), 2008 WL 9476380 (C.D. Cal. July 8, 2008) (same); *West Virginia Laborers Tr. Fund v. STEC, Inc.*, No. SACV 11-01171-JVS (MLGx), 2011 WL 6156945, (C.D. Cal. Oct. 7, 2011) (same); *Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK (PJWx), 2014 WL 4330787 (C.D. Cal. Aug. 21, 2014) (same); *Pac. Inv. Mgmt. Co. LLC v. AIG, Inc.*, No. SA CV 15-0687-DOC, 2015 WL 3631833 (C.D. Cal. June 10, 2015) (same); *Deutsche Bank National Trust Company v. Hagan*, No. 15-00376 JMS-KSC, 2015 WL 7720465 (D. Haw. Nov. 27, 2015) (same); *Young v. Pac. Biosciences of California*, Nos. 5:11-cv-05668 EJD, 5:11-cv-05669 EJD, 2012 WL 851509 (N.D. Cal Mar. 13, 2012) (same); *Harper v. Smart Techs., Inc*, No. C 11-5232 SBA, 2012 WL 12505217, (N.D. Cal. Sept. 28, 2012); *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 WL 5596965 (N.D. Cal. Oct. 11, 2013) (same); *Desmarais v. Johnson*, No. C 13-03666 WHA, No. C 13-03668 WHA, 2013 WL 5735154 (N.D. Cal. Oct. 22, 2013) (same); *Reyes v. Zynga Inc.*, No. C 12-05065 JSW, 2013 WL 5529574 (N.D. Cal. Jan 23, 2013) (same); *Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. 14-cv-04516-WHO, 2015 WL 65110 (N.D. Cal. Jan. 5, 2015) (same); *City of Warren Police and Fire Ret. Sys. v. Revance Therapeutics, Inc.*, No. 15-cv-02512-HSG, 2015 WL 5117631 (N.D. Cal. Aug. 31, 2015) (same); *Liu v. Xoom Corp.*, No. 15-CV-00602-LHK, 2015 WL 3920074 (N.D. Cal. June 25, 2015) (same); *Steinberg v. MobileIron, Inc.*, No. 15-cv-04416-VC, slip op. (N.D. Cal. Nov. 30, 2015) (same); *Cervantes v. Dickerson*, No. 15-cv-3825-PJH, 2015 WL 6163573 (N.D. Cal. Oct. 21, 2015) (same); *Buelow v. Alibaba Grp. Holding Ltd.*, No. 15-cv-05179-BLF, 2016 U.S. Dist. LEXIS 7444 (N.D. Cal. Jan. 20, 2016) (same); *Iron Workers Mid-South Pension Fund v. Terraform Glob., Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016) (same); *Electrical Workers Local #357 Pension and Health & Welfare Trusts v.*

(Footnote continued on following page)

Eleventh[11] circuits have held the opposite and remanded.[12] Even within some of these circuits, district court rulings are inconsistent.[13]

Clovis Oncology, Inc., No. 16-cv-00933-EMC, 2016 WL 2592947 (N.D. Cal. 2016) (same); *Fraser v. Wuebbels*, No. 15-cv-06326-BLF, 2016 WL 827373 (N.D. Cal. Mar. 3, 2016) (same); *Oklahoma Police Pension & Retirement System v. Sientra, Inc., et al.*, No. 5:15-cv-05549-ENJ, 2016 U.S. Dist. LEXIS 67563 (N.D. Cal. May 20, 2016) (same); *Hawaii Structural Ironworkers Pension Tr. Fund v. Calpine Corp.*, No. 03CV0714BTM(JFS), 2003 WL 23509312 (S.D. Cal. Aug. 27, 2003) (same); *West Palm Beach Police Pension Fund v. CardioNet, Inc.*, No. 10cv711-L(NLS), 2011 WL 1099815 (S.D. Cal. Mar. 24, 2011) (same); *but see Brody v. Homestore, Inc.*, 240 F. Supp. 2d 1122 (C.D. Cal. 2003) (denying remand); *Lapin v. Facebook, Inc.*, Nos. C-12-3195 MMC, C-12-3196 MMC, C-12-3199 MMC, C-12-3200 MMC, C-12-3201 MMC, C-12-3202 MMC, C-12-3203 MMC, 2012 WL 3647409 (N.D. Cal. Aug. 23, 2012) (denying remand).

[11] *Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distrib., Inc.*, No. 8:04-cv-961-T-26MAP, 2004 WL 6246913 (M.D. Fla. June 25, 2004) (granting remand); *City of Birmingham Ret. and Relief Sys. v. MetLife, Inc.*, No. 2:12-cv-02626-HGD, 2013 WL 5526621 (N.D. Ala. Aug. 23, 2013) (same); *Martin v. BellSouth, Corp.*, No. 1:03-CV-728-WBH, 2003 WL 26476752 N.D. Ga. July 3, 2003) (same); *Williams v. AFC Enters., Inc.*, No. CIVA 103-CV-2490-TWT, 2003 WL 24100302 (N.D. Ga. Nov. 20, 2003) (same); *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 2729011 (N.D. Ga. Sept. 14, 2007) (same); *Zia v. Med. Staffing Network, Inc.*, 336 F. Supp. 2d 1306 (S.D. Fla. 2004) (same).

[12] The district courts in the 6th Circuit have split evenly on the question. *See Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 WL 9152972 (N.D. Ohio Feb. 12, 2009) (granting remand); *Rosenberg v. Cliffs Nat. Res., Inc.*, No. 1:14CV1531, 2015 WL 1534033 (N.D. Ohio Mar. 25, 2015) (granting remand); *but see In re King Pharmaceuticals, Inc.*, 230 F.R.D.

(Footnote continued on following page)

This morass of rulings has led to a phenomenon that Congress could not have been intended when it enacted SLUSA—class actions alleging only 33 Act claims may be filed in state court in some jurisdictions, while other jurisdictions prohibit filing in state court. The inconsistency is particularly noticeable in the two states where most securities class action litigation is conducted: California and New York. District courts in California (particularly in the Northern District of California encompassing Silicon Valley) have generally held that 33 Act class actions are not removable to federal court, while judges in the Southern District of New York have ruled that SLUSA gives federal courts exclusive jurisdiction over such actions. In fact, one court in the Northern District of California recently ordered defendants to pay plaintiffs' attorneys' fees and costs because defendants "lacked an objectively reasonable basis for seeking removal,"[14] while a court in the Southern District of New York denied remand just a month earlier.[15]

The result has been a flood of 33 Act class actions filed in California state court. As Petitioners noted, the number of these filings has increased radically

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503 (E.D. Tenn. 2004) (denying remand); *Kulinski v. Am. Elec. Power Co., Inc.*, No. CivA.C-2-03-412, 2003 WL 24032299 (S.D. Ohio Sept. 19, 2003) (denying remand).

[13] *See supra* notes 3, 5, 6 & 10.

[14] *Iron Workers*, 2016 WL 827374, at *5-6.

[15] *Hung v. Idreamsky Technology Limited*, 15-cv-03794, 2016 U.S. Dist. LEXIS 8389 (S.D.N.Y. Jan. 25, 2016).

since 2011.[16] The rate continues to increase. In 2014, only five such cases were brought in California state court. In 2015, fourteen cases were filed. In the first five months of 2016, ten such cases have already been filed, at an annual pace of 24.[17]

Regardless of what one believes SLUSA's jurisdictional amendments did, it is indisputable that Congress could not have intended the Securities Litigation ***Uniform*** Standards Act to result in this morass of inconsistent rulings across the country. Nor could Congress have intended that cases filed in California be litigated in state court, while substantively identical cases filed in New York are litigated in federal court.

Only a decision by this Court can put an end to the inconsistencies in how district courts apply SLUSA. The federal appellate courts cannot resolve this dispute because they are unlikely to ever address the issue. The district court decisions have all been made on motions to remand cases removed from state court. Federal law prohibits appellate court review of remand orders. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."); *Williams v. AFC Enters. Inc.*, 389 F.3d 1185, 1191 (11th Cir. 2004) (holding district court's remand of 33 Act class action not reviewable under Section 1447(d)). Similarly, decisions from state appellate courts are also unlikely since they

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[16] Petition for Certiorari at 8.

[17] *Id.* at Appendix I.

require the appellate courts to grant discretionary appeals, which is seldom done. For example, in this case the state trial court denied Petitioners' motion for judgment on the pleadings, but both the appellate court and the California Supreme Court denied Petitioners' petitions for writs of mandate.[18] Even if state appellate courts ever were to address the issue, such rulings could themselves be inconsistent, and they would not bind federal courts. Because decisions from state high courts and federal circuit courts are extremely unlikely, the district court split justifies this Court's review.

This Court has granted certiorari in similar—and less dramatic—lower court splits. In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), the Court granted certiorari to resolve a conflict among five state appellate and federal district courts on the question of whether federal courts had subject matter jurisdiction over suits arising under the Outer Continental Shelf Lands Act. Similarly, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Court granted certiorari in part to address the "disarray" among federal district courts regarding the constitutionality of the federal sentencing guidelines, even where federal appellate review was available. The reasons to grant certiorari are even stronger here than in *Mistretta*, where circuit courts could have addressed the issue, or *Gulf Offshore*, where far fewer district courts had addressed the issue.

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[18] The California Court of Appeal has denied writs in similar cases. *See, e.g., Audience, Inc. et al. v. Superior Court*, Case No. H040266 (Cal Ct. App. 6th Dist. May 22, 2014).

Given the important federal interest in the uniform application of the federal securities laws, divergent and contradictory district court opinions, and the increasing frequency of 33 Act cases being filed in state court, the time is ripe for guidance from this Court on this contentious issue.

II. THERE ARE SIGNIFICANT LEGAL AND ECONOMIC CONSEQUENCES IF 33 ACT CLASS ACTIONS ARE PERMITTED TO PROCEED IN STATE COURT.

The split among the district courts can have important consequences for the cases that remain in state court. State courts do not regularly apply the Private Securities Litigation Reform Act ("PSLRA"). The PSLRA includes several provisions designed to curb abusive securities litigation and *in terrorem* settlements: requirements that plaintiffs certify that they have reviewed the complaint and did not purchase the security at the direction of counsel or to participate in the suit, and that they identify other 33 Act actions in which they were a plaintiff in the last three years. 15 U.S.C. § 77z-1(a)(2). The PSLRA also requires courts to include findings regarding compliance with Rule 11 and issue sanctions for any violation. 15 U.S.C. § 77z-1(c). Importantly, the PSLRA requires that in any 33 Act case, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b). Many of the provisions apply only to actions brought "pursuant to the Federal Rules of Civil Procedure," i.e., brought in federal court. 15 U.S.C. § 77z-1(a). Although the discovery

stay does not have this express limitation, state courts usually do not stay discovery.[19] This is particularly important because the costs of discovery mount quickly and could cause defendants to settle unmeritorious actions rather than incur those costs, potentially resulting in the very *in terrorem* settlements that the PSLRA was designed to avoid. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313. (2007) (recognizing that Congress passed the PSLRA "[a]s a check against abusive litigation by private parties"). Filing in state court can also allow a plaintiff to avoid consolidation with federal actions asserting the same claims, leading to identical cases proceeding simultaneously in federal and state court.

Indeed, securities actions in state court have quite different outcomes than those in federal court. For instance, state courts dismiss 33 Act cases far less frequently than federal courts. Federal courts between 2011 and 2015 dismissed 29% of cases filed with only 33 Act claims.[20] However, from 2011 to 2015, of the 25 such cases filed in California state courts, only two have been involuntarily dismissed.[21]

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[19] *See* Douglas H. Flaum, et al., *Why Section 11 Class Actions Are Proliferating in California*, LAW360, April 27, 2015; *see also* Priya Cherian Huskins, *IPO Companies, Section 11 Suits and California State Court*, WOODRUFF SAWYER & CO., April 26, 2016, https://wsandco.com/do-notebook/ipo-companies-section-11-suits-california-state-court/.

[20] *See* Appendix A. Fifty-one cases were filed in federal court between 2011 and 2015. Ten of these were remanded to state court. Of the 41 cases that remained in federal court 12 were involuntarily dismissed.

[21] *See* Appendix B.

Filing 33 Act cases in state court may also lead to higher settlement amounts. Between 1996 and 2015, cases with only 33 Act claims had a median settlement amount of $4 million.[22] The median settlement amount for such cases filed in California state court since 2011 was $8 million.[23] Thus, the split among district courts regarding the meaning of SLUSA's jurisdictional amendments has a very real effect on the resolution of these cases.

Plaintiffs' counsel are clearly aware of these differences in federal and state court procedures and outcomes. As described above, more and more cases are being filed in state court, particularly in California. Plaintiffs are filing cases in California state court even where the Company is headquartered in another state, often based on the California residence of a single outside director.[24] This is a direct response to the favorable rulings in federal district courts of California remanding these cases when they are removed. As two attorneys for the plaintiffs' bar acknowledged, "the absence of any Court of Appeals or Supreme Court authority will allow plaintiffs to continue filing these actions, primarily in California state courts, while avoiding

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[22] Cornerstone Research, *Securities Class Action Settlements 2015 Review and Analysis* (2015). This median settlement amount includes state court cases.

[23] *See* Huskins, *supra* note 19.

[24] *See, e.g., Cervantes v. Dickerson*, Case No. 534768 (San Mateo Sup. Ct. filed July 21, 2015) (one outside director alleged to be citizen of California while the company and the individual defendants were citizens of New York).

jurisdictions that lack clear guidance."[25] *Amici* urge this Court to hear this case and provide the clear guidance needed for a uniform application of SLUSA and the federal securities laws.

III. A UNIFORM INTERPRETATION OF THE SECURITIES ACT, PSLRA, AND SLUSA IS NECESSARY FOR THE EFFICIENT AND CONSISTENT ADMINISTRATION OF JUSTICE.

The complexities of securities litigation make securities class actions well-suited for federal courts, and there is a national interest in consistent enforcement of the federal securities laws. This Court has recognized the important federal interest in regulating the integrity of the markets, stating "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). To that end Congress passed the 33 Act and the Securities Exchange Act of 1934 ("34 Act"), which "have anchored federal regulation of vital elements of our economy." *Id.* In recent years this Court has granted certiorari repeatedly in cases concerning the construction of the federal securities laws.[26] *Amici*

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[25] Michael W. Stocker and Francis P. McConville, *Securities Act Cases Are Surging...in State Courts?*, LOS ANGELES DAILY JOURNAL, July 28, 2015.

[26] *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 249-50 (2010); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 36 (2011); *Janus Capital Grp., Inc. v. First*

(Footnote continued on following page)

urge this Court to grant certiorari and hold that the plain reading and legislative purpose of SLUSA requires all covered class actions bringing 33 Act claims to be filed in federal court. Only this conclusion accomplishes Congress's goal of ensuring the consistent application of the federal securities laws in federal court and preventing plaintiffs from avoiding the PSRLA by filing in state court. Conversely, concluding that state courts retain jurisdiction over federal claims would lead to the bizarre situation where class actions alleging *only* state claims or both state and federal claims *must* be removed to federal court, but those alleging only *federal* claims may remain in *state* court. *See Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009).

Congress's goal in passing SLUSA was to end the circumvention of the PSLRA's provisions by plaintiffs who were filing securities class actions in state court. Congress aimed to "correct the perceived failure of the PSLRA to curb abuses of federal securities fraud litigation" by enacting "national standards for securities class action lawsuits involving nationally traded securities." *See Knox*, 613 F. Supp. 2d at 421; Pub. L. No. 105–353, § 2(5), 112 Stat. 3227 (1998). Congress explicitly noted in SLUSA's preamble that after the PSLRA "a number of securities class action lawsuits have shifted from Federal to State courts . . . this shift has prevented [the PSLRA] from fully achieving its objectives . . . ."

Derivative Traders, 564 U.S. 135, 139 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011).

Thus, the purpose of SLUSA was to "***make[] Federal court the exclusive venue for most securities class action lawsuits***." H.R. Conf. Rep. No. 105-803, 2d Sess. (1998) at 13 (emphasis added). This purpose was noted by many members of Congress[27], the President[28], and even plaintiffs' attorneys.[29] Yet, district court rulings interpreting SLUSA's jurisdictional provisions to allow for state

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[27] For example, Representative Lofgren stated that SLUSA "will finally slam the door on strike suits by establishing Federal court as the exclusive venue for securities class actions." 144 Cong. Rec. E1383 (daily ed. July 21, 1998). Senator Kerry stated that SLUSA "mov[es] all class action securities lawsuits to federal court." 144 Cong. Rec. S4778-03, S4802 (1998). Senator Feinstein stated, "[S]uits traditionally filed in federal courts are now being placed in state courts" and SLUSA "will protect companies from this side-door tactic" by "establishing a uniform system for the movement of cases from state to federal court." *Id.* at S4797. Senator Grams said, "[T]his Act simply requires that class action lawsuits against nationally traded securities be filed in Federal court." *Id.* at S4802.

[28] In his SLUSA signing statement, President Clinton said: "[T]he uniform standards provided by this legislation state that class actions generally can be brought only in Federal court, where they will be governed by Federal law . . . ." Presidential Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 WEEKLY COMP. PRES. DOC. 45, at 2248 (Nov. 3, 1998).

[29] A spokesman for the National Association of Securities and Commercial Law Attorneys testified in Congress that SLUSA "would eliminate even *Federal* cases from being heard in State courts," and the "States would be precluded from hearing actions under the 1933 Act . . . ." *Hearing Before the Subcomm. on Sec. of the Comm. on Banking, Hous., & Urban Affairs*, 105th Cong. 64 (Oct. 29, 1997) (prepared statement of Herbert E. Milstein).

court jurisdiction over class actions asserting only 33 Act claims directly frustrate this purpose.

SLUSA's jurisdictional provisions should be interpreted consistently with Congress's objective to establish federal courts as the exclusive forum for class actions regarding nationally traded securities. As this Court recently held in its review of the Affordable Care Act, where possible, courts should adopt the statutory reading that comports with the intent of the statute as a whole: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). SLUSA's jurisdictional provisions comport with Congress's intent to make federal courts the exclusive jurisdiction for securities class actions, and that is the interpretation this Court should adopt.

Unless SLUSA is interpreted in this way, state court jurisdiction over securities class actions has and will continue to result in the 33 Act being applied inconsistently. State court decisions at the trial court level, unlike federal courts, rarely result in published—or even readily available unpublished—opinions. As this Court has noted, an important objective of the securities laws is "to maintain public confidence in the marketplace," which is achieved in part through private enforcement of the securities laws. *Dura*, 544 U.S. at 345. The lack of publicly available decisions hinders the uniform application of the securities

laws.[30] Further, state courts are not bound by federal court decisions, except for those of this Court.[31] Thus, each state will be a circuit unto itself, leading to a patchwork of legal standards for nationally traded securities.[32] This was not Congress's intent in enacting SLUSA. Finally, federal courts have addressed the issues presented in securities class actions since the 33 Act's enactment, whereas most state courts have little or no familiarity with the federal securities laws. This lack of familiarity with the issues manifests itself in a mosaic of inconsistent rulings.[33]

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[30] Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 989 (2008) ("[E]veryone who has empirically studied the issue has concluded that . . . the general unavailability of unpublished opinions potentially leads to a misconception of the law itself.").

[31] *See McLaughlin v. Walnut Props., Inc.*, 119 Cal. App. 4th 293, 297 (Cal. Ct. App. 2004) ("Since we are construing a federal statute, we must apply and interpret federal law. Decisions of the United States Supreme Court are binding. Lower federal court decisions, including those of the Ninth Circuit Court of Appeal, are not. If federal precedent is either lacking or in conflict, we will independently determine federal law.").

[32] *See Unschuld*, 2007 WL 2729011 at *8-9.

[33] *Compare, e.g., In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1406-07 (9th Cir. 1996) (holding that defendant company was not liable under Section 11 of the 33 Act for failing to disclose unknown plans of another company) *with Robinson v. Audience, Inc.*, No. 1:12-cv-232227, slip opinion (Santa Clara Sup. Ct. Sept. 3, 2013) (denying demurrer where complaint alleged defendant company failed to disclose customer's unknown plans).

This Court should grant *certiorari* to review this case and direct the lower courts to interpret SLUSA's jurisdictional provisions consistent with Congress's intent to make federal court the exclusive forum for securities class actions, thus ensuring the uniform application of the federal securities laws.

CONCLUSION

For these reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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JUNE 27, 2016

APPENDIX A — CASE OUTCOMES FOR FEDERAL CLASS ACTIONS FILED FROM 2011-2015; FILINGS WITH SECTION 11 CLAIMS AND NO RULE 10B-5 CLAIMS

FOLDOUT

			United Western Bancorp, Inc., et al		D. Colorado	Involuntary
3.	5/12/2011	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	10th	W.D. Oklahoma	Settled
4.	6/17/2011	11-CV-02919	Nancy Kowalski, et al. v. Apple REIT Ten, Inc., et al.	2nd	E.D. New York	Dismissed - Involuntary
5.	8/19/2011	11-CV-05831	Bhushan Athale, et al. v. SinoTech Energy Limited, et al.	2nd	S.D. New York	Settled
6.	10/25/2011	11-CV-81184	Martin J Fuller, et al. v. Imperial Holdings, Inc, et al.	11th	S.D. Florida	Settled
7.	10/28/2011	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	6th	M.D. Tennessee	Settled
8.	11/14/2011	11-CV-81270	Greenfield Childrens Partnership, et al. v. FriendFinder Networks, Inc., et al.	11th	S.D. Florida	Dismissed - Involuntary
9.	11/23/2011	11-CV-05669	Matthew Sandnas, et al. v. Pacific Biosciences of California, Inc., et al.	9th	N.D. California	Remanded to State Court
10.	11/28/2011	11-CV-08622	Barbara Blazer, et al. v. Apple REIT Nine, Inc., et al.	2nd	S.D. New York	Dismissed - Voluntary
11.	2/6/2012	12-CV-00373	Matthew A. Brady, et al. v. Kosmos Energy Ltd., et al.	5th	N.D. Texas	Settled
12.	5/23/2012	12-CV-04081	Brian Roffe Profit Sharing Plan, et al. v. Facebook, Inc., et al.	2nd	S.D. New York	Ongoing
13.	5/25/2012	12-CV-04191	David Schottenstein, et al. v. Credit Suisse AG, et al.	2nd	S.D. New York	Dismissed - Involuntary
14.	5/25/2012	12-CV-00054	Ming Yang, et al. v. Tibet Pharmaceuticals, Inc., et al.	3rd	D. Virgin Islands	Settled
15.	6/20/2012	12-CV-04839	Todd Augenbaum, et al. v. Lone Pine Resources, Inc., et al.	2nd	S.D. New York	Dismissed - Involuntary
16.	6/29/2012	12-CV-05124	George Scott, et al. v. Whitacre, et al.	2nd	S.D. New York	Dismissed - Involuntary
17.	7/20/2012	12-CV-02196	Chaz Campton, et al. v. Ignite Restaurant Group, Inc., et al.	5th	S.D. Texas	Settled
18.	8/16/2012	12-CV-04377	Olivia Niitsoo, et al. v. Alpha Natural Resources, Inc., et al.	4th	S.D. West Virginia	Remanded to State Court
19.	10/12/2012	12-CV-81123	Francis Howard, et al. v. Chanticleer Holdings, Inc., et al.	11th	S.D. Florida	Settled
20.	11/2/2012	12-CV-05636	Michael Toth, et al. v. Envivio, Inc., et al.	9th	N.D. California	Remanded to State Court
21.	11/21/2012	12-CV-08557	Shirley Horn, et al. v. Hi-Crush Partners LP, et al.	2nd	S.D. New York	Settled
22.	2/5/2013	13-CV-00842	Monroe County Employees' Retirement System, et al. v. YPF Sociedad Anonima, et al.	2nd	S.D. New York	Dismissed - Involuntary
23.	5/24/2013	13-CV-03935	Firefighters Pension & Relief Fund of the City of New Orleans, et al. v. T Paul Bulmahn, et al.	5th	E.D. Louisiana	Case Dismissed - Involuntary
24.	7/10/2013	13-CV-04790	David Adrian Luciano, et al. v. Linnco, LLC, et al.	2nd	S.D. New York	Case Dismissed - Involuntary

2.	[illegible]	[illegible]	United Western Bancorp, Inc., et al.	10th	D. Colorado	Involuntary
3.	5/12/2011	11-CV-00520	Northumberland County Retirement System, et al. v. GMX Resources, Inc., et al.	10th	W.D. Oklahoma	Settled
4.	6/17/2011	11-CV-02919	Nancy Kowalski, et al. v. Apple REIT Ten, Inc., et al.	2nd	E.D. New York	Dismissed - Involuntary
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6.	10/25/2011	11-CV-81184	Martin J Fuller, et al. v. Imperial Holdings, Inc, et al.	11th	S.D. Florida	Settled
7.	10/28/2011	11-CV-01033	Karsten Schuh, et al. v. HCA Holdings, Inc., et al.	6th	M.D. Tennessee	Settled
8.	11/14/2011	11-CV-81270	Greenfield Childrens Partnership, et al. v. FriendFinder Networks, Inc., et al.	11th	S.D. Florida	Dismissed - Involuntary
9.	11/23/2011	11-CV-05669	Matthew Sandnas, et al. v. Pacific Biosciences of California, Inc., et al.	9th	N.D. California	Remanded to State Court
10.	11/28/2011	[illegible] 08622	Barbara Blazer, et al. v. Apple REIT Nine, Inc., et al.	2nd	S.D. New York	Dismissed - Voluntary
11.	2/6/2012	12-CV-00373	Matthew A. Brady, et al. v. Kosmos Energy Ltd., et al.	5th	N.D. Texas	Settled
12.	5/23/2012	12-CV-04081	Brian Roffe Profit Sharing Plan, et al. v. Facebook, Inc., et al.	2nd	S.D. New York	Ongoing
13.	5/25/2012	12-CV-04191	David Schottenstein, et al. v. Credit Suisse AG, et al.	2nd	S.D. New York	Dismissed - Involuntary
14.	5/25/2012	12-CV-00054	Ming Yang, et al. v. Tibet Pharmaceuticals, Inc., et al.	3rd	D. Virgin Islands	Settled
15.	6/20/2012	12-CV-04839	Todd Augenbaum, et al. v. Lone Pine Resources, Inc., et al.	2nd	S.D. New York	Dismissed - Involuntary
16.	6/29/2012	12-CV-05124	George Scott, et al. v. Whitacre, et al.	2nd	S.D. New York	Dismissed - Involuntary
17.	7/20/2012	12-CV-02196	Chaz Campton, et al. v. Ignite Restaurant Group, Inc., et al.	5th	S.D. Texas	Settled
18.	8/16/2012	12-CV-04377	Olivia Niitsoo, et al. v. Alpha Natural Resources, Inc., et al.	4th	S.D. West Virginia	Remanded to State Court
19.	10/12/2012	12-CV-81123	Francis Howard, et al. v. Chanticleer Holdings, Inc., et al.	11th	S.D. Florida	Settled
20.	11/2/2012	12-CV-05636	Michael Toth, et al. v. Envivio, Inc., et al.	9th	N.D. California	Remanded to State Court
21.	11/21/2012	12-CV-08557	Shirley Horn, et al. v. Hi-Crush Partners LP, et al.	2nd	S.D. New York	Settled
22.	2/5/2013	13-CV-00842	Monroe County Employees' Retirement System, et al. v. YPF Sociedad Anonima, et al.	2nd	S.D. New York	Dismissed - Involuntary
23.	5/24/2013	13-CV-03935	Firefighters Pension & Relief Fund of the City of New Orleans, et al. v. T Paul Bulmahn, et al.	5th	E.D. Louisiana	Case Dismissed - Involuntary
24.	7/10/2013	13-CV-04790	David Adrian Luciano, et al. v. Linnco, LLC, et al.	2nd	S.D. New York	Case Dismissed - Involuntary

FOLDOUT

31.	5/19/2014	14-CV-03577	Waterford Township Police & Fire Retirement System, et al. v. Ply Gem Holdings, Inc., et al.	2nd	S.D. New York	Ongoing
32.	5/30/2014	14-CV-03876	Waterford Township Police & Fire Retirement System, et al. v. Regional Management Corp., et al.	2nd	S.D. New York	Ongoing
33.	5/30/2014	14-CV-03878	Karen J Desrocher, et al. v. Covisint Corporation, et al.	2nd	S.D. New York	Settled
34.	7/18/2014	14-CV-05450	Amar Singh, et al. v. Prosensa Holding N.V., et al.	2nd	S.D. New York	Dismissed - Involuntary
35.	8/6/2014	14-CV-06170	Thomas Welch, et al. v. Pacific Coast Oil Trust, et al.	9th	C.D. California	Remanded to State Court
36.	8/26/2014	14-CV-06942	Richard Steck, et al. v. Santander Consumer USA Holdings Inc., et al.	2nd	S.D. New York	Ongoing
37.	10/8/2014	14-CV-04516	Plymouth County Retirement System, et al. v. Model N, Inc., et al.	9th	N.D. California	Remanded to State Court
38.	10/27/2014	14-CV-00997	Michael Johnson, et al. v. CBD Energy Limited, et al.	5th	E.D. Texas	Ongoing
39.	12/24/2014	14-CV-08020	Wei Ding, et al. v. Roka Bioscience, Inc., et al.	3rd	D. New Jersey	Ongoing
40.	1/6/2015	15-CV-00602	Alexander Liu, et al. v. Xoom Corporation, et al.	9th	N.D. California	Remanded to State Court
41.	2/24/2015	15-CV-01337	Dekalb County Employees Retirement System, et al. v. Controladora Vuela Compañía de Aviacion, S.A.B. de C.V., et al.	2nd	S.D. New York	Ongoing
42.	4/30/2015	15-CV-03813	Firerock Global Opportunity Fund LP, et al. v. Rubicon Technology, Inc., et al.	7th	N.D. Illinois	Settled
43.	5/15/2015	15-CV-03773	Errol Rudman, et al. v. CHC Group Ltd., et al.	2nd	S.D. New York	Ongoing
44.	6/5/2015	15-CV-02512	City of Warren Police and Fire Retirement System, et al. v. Revance Therapeutics, Inc., et al.	9th	N.D. California	Remanded to State Court
45.	8/4/2015	15-CV-06126	Carl Stitt, et al. v. On Deck Capital, Inc., et al.	2nd	S.D. New York	Ongoing
46.	8/31/2015	15-CV-06880	Andrew D. Nguyen, et al. v. Maxpoint Interactive, Inc., et al.	2nd	S.D. New York	Ongoing
47.	10/5/2015	15-CV-13501	Anthony Fortunato, et al. v. Akebia Therapeutics, Inc., et al.	1st	D. Massachusetts	Remanded to State Court
48.	10/29/2015	15-CV-04981	Juan M. Rodriguez Beltran, et al. v. Terraform Global, Inc., et al.	9th	N.D. California	Ongoing
49.	11/13/2015	15-CV-08954	Enrico Vaccaro, et al. v. New Source Energy Partners L.P., et al.	2nd	S.D. New York	Ongoing
50.	12/7/2015	15-CV-14032	Heather Carlson, et al. v. Ovascience, Inc., et al.	1st	D. Massachusetts	Remanded to State Court
51.	12/9/2015	15-CV-00546	Marcia Goldberg, et al. v. Miller Energy Resources, Inc., et al.	6th	E.D. Tennessee	Ongoing

Appendix A

FOLDOUT

Dismissed – Voluntary	**3**	**7%**
Dismissed – Involuntary	**12**	**29%**
Settled	**13**	**32%**
Ongoing	13	32%
Total	41	100%

Source:
Stanford Law School Securities Class Action Clearinghouse

Note:
[1] Case status according to the Stanford Law School Securities Class Action Clearinghouse database as of June 23, 2016. Cases are identified by the Clearinghouse based on the claims made in first identified complaint.
[2] Other claims may or may not be present.

APPENDIX B — '33 ACT CLASS ACTIONS FILED IN CALIFORNIA STATE COURTS FROM 2011-2015

FOLDOUT

			514673	Voluntary
3.	Oct. 21, 2011	Young v. Pacific Biosciences of California, Inc.	San Mateo County CIV509210	Settled
4.	Mar. 13, 2012	Marcano v. Nye (Zeltiq Aesthetics, Inc.)	Alameda County RG12621290	Dismissed – Involuntary
5.	May 30, 2012	Lazar v. Facebook, Inc.	San Mateo County CIV514065, removed to federal court on June 21, 2012 N.D. Cal. 12-CV-03199 and transferred on Oct. 9, 2012 to S.D.N.Y 1:12-MD-02389-RWS	Removed to federal court and not remanded
6.	Aug. 1, 2012	Reyes v. Zynga Inc.	San Francisco County CGC-12-522876	Dismissed – Voluntary[3]
7.	Sept. 13, 2012	Robinson v. Audience, Inc.	Santa Clara County 1-12-CV-232227	Settled
8.	Oct. 19, 2012	Toth v. Envivio, Inc.	San Mateo County CIV517481, consolidated on Nov. 22 2013 San Mateo County CIV517185	Settled
9.	July 10, 2013	Desmarais v. Johnson (CafePress Inc.)	San Mateo County CIV522744	Settled
10.	Apr. 1, 2014	Beaver County Employees Retirement Fund v. Cyan, Inc.	San Francisco County CGC-14-538355	Ongoing
11.	Apr. 3, 2014	Rajasekaran v. CytRx Corp.	Los Angeles County BC541426	Ongoing[4]
12.	June 20, 2014	In re FireEye, Inc. Securities Litigation	Santa Clara County 1-14-CV-266866	Ongoing
13.	Sept. 5, 2014	Plymouth County Retirement System v. Model N, Inc.	San Mateo County CIV530291	Settled
14.	Oct. 16, 2014	Berliner v. Pacific Coast Oil Trust	Los Angeles County BC560944, consolidated on Nov. 18, 2014 Los Angeles County BC550418	Settled

[1] This case was voluntarily dismissed due to resolution of a related securities class action in federal court in the Central District of California, which was settled on May 23, 2013. Decl. in Support of Plaintiff (Req. for Dismissal), *West Virginia Laborers' Trust Fund v. STEC, Inc.*, Case No. 30-2011-00489022 (Orange County August 16, 2013).

[2] Plaintiffs voluntarily dismissed their claims after the final settlement of a related Section 11 case in federal court. Memorandum of Law in Support of Pl.'s Mot. for Voluntary Dismissal, Case No. CGC-11-514673 (San Francisco Cty. Super. Ct. Sept. 30, 2014).

[3] Plaintiff requested voluntary dismissal on the basis that Plaintiff no longer wished to participate in the suit individually, and purported class members were included within the class of a pending federal action. Pl.'s Unopposed Req. for Voluntary Dismissal of Action, *Reyes v. Zynga Inc.*, Case No. CGC-12-522876 (San Francisco Cty. Super. Ct. Feb. 4, 2015).

[4] This case was stayed pending resolution of a related federal action in which Plaintiff was an

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18.	Apr. 2, 2015	Firefock Global Opportunity Fund LP v. Castlight Health, Inc.	San Mateo County CIV533203	Ongoing
19.	May 1, 2015	City of Warren Police and Fire Retirement System v. Revance Therapeutics, Inc.	San Mateo County CIV533635, transferred on Nov. 6, 2015 to Santa Clara County 15-CV-287794	Ongoing
20.	June 2, 2015	Hunter v. Aerohive Networks, Inc.	San Mateo County CIV534070	Settled
21.	July 21, 2015	Cervantes v. Dickerson (Etsy, Inc.)	San Mateo County CIV534768	Ongoing
22.	Aug. 11, 2015	Shen v. TrueCar, Inc.	Los Angeles County BC590999, removed on Aug. 8, 2015 to C.D. Cal. 2:15-CV-06270-R-PJW	Removed to federal court and not remanded[6]
23.	Aug. 24, 2015	Steinberg v. MobileIron, Inc.	Santa Clara County 1-15-CV-284761, consolidated on Jan. 4, 2016 Santa Clara County 1-15-CV-284001	Ongoing
24.	Oct. 5, 2015	Buelow v. Alibaba Group Holding Limited	San Mateo County CIV535692	Ongoing
25.	Oct. 23, 2015	Fraser v. Wuebbels (TerraForm Global, Inc.)	San Mateo County CIV535963, removed on Apr. 26, 2016 to N.D. Cal. 5:16-cv-02273	Removed to federal court and not remanded[7]
26.	Nov. 19, 2015	Kleiman v. Sientra, Inc.	San Mateo County CIV536313	Ongoing
27.	Dec. 1, 2015	Rezko v. XBiotech Inc.	Los Angeles County BC602793	Ongoing
28.	Dec. 7, 2015	Beaver County Employees Retirement Fund v. Avalanche Biotechnologies, Inc.	San Mateo County CIV536488	Ongoing

All Filings:

Status Summary	Counts	Percentage[5]
Dismissed – Voluntary	4	14%
Dismissed – Involuntary	2	7%
Settled	7	25%
Removed to Federal Court and Not Remanded	3	11%
Ongoing	12	43%
Total	28	100%

[5] Plaintiff sought voluntary dismissal in the interest of the class members, who Plaintiff believed to be adequately represented in a parallel suit. Memorandum of Law In Further Support of Request for Voluntary Dismissal, *Liu v. Xoom Corp.*, Case No. CGC-15-543531 (San Francisco Cty. Super. Ct. Dec. 15, 2015).

[6] This case was removed to federal court and plaintiff did not file a motion to remand. *See Ning Shen et al. v. TrueCar, Inc. et al.*, Case No. 2:15-cv-06270 (C.D. Cal. Aug. 18, 2015).

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